

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

74-2510

To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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:
ANGEL ISAAC,
:
:
:
Relator-Appellant,
:
:
:
-against-
:
:
Docket No. 74-2510
:
:
UNITED STATES OF AMERICA,
:
:
:
Respondent-Appellee.
:
:
:
-----X

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APPENDIX TO THE BRIEF
FOR
RELATOR-APPELLANT

=====

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,
Of Counsel

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PAGINATION AS IN ORIGINAL COPY

CRIMINAL DOCKET
UNITED STATES DISTRICT COURT

JUDGE GRIESA 72 CR. 1362

D. C. Form No. 100 Rev.

TITLE OF CASE
THE UNITED STATES

ATTORNEYS

For U. S.:

NICHOLAS FIGUEROA, AUSA
X 6432

vs.

1) HERIBERTO PROSPER and

2) ANGEL ISAAC

For Defendant:

STATISTICAL RECORD

COSTS

DATE

NAME OR
RECEIPT NO.

REC.

DISB.

J.S. 2 mailed

Clerk

4/9/74
11-774

Large
US Treas

5 -

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J.S. 2 mailed / - -

Marshal

Woburn comp. #72-3816

Docket fee

Title conspiracy to violate
Title 21

Sec. 812, 841(a)(1), 841(b)(1)(A)
(count 1) - 21:812, 841(a)(1),
841(b)(1)(B), possess with intent
to distribute cocaine, II (cts. 2
thru 5)

--FIVE COUNTS--

DATE

PROCEEDINGS

12-20-72 / Filed Indictment.

1-2-73 / Prosper- (Atty. present) Deft. pleads not guilty. Assigned to Judge Griesa.
Bail continued at \$10,000. P.R.F. sec. by 10% --- Bonsal, J.

1-8-73 / Isaac- (Atty. present) Deft. pleads not guilty. Continued on \$10,000. P.R.F.
sec. by \$1,000. --- Bonsal, J.

1-9-73 / Isaac--Filed Notice of Appearance by Martin J. Siegel, 250 W. 57th St
N.Y. 10019, 586-1410

1-30-73 / Isaac-Filed affidavit and notice of motion for orders granting
grand jury minutes, dismissing the indictment, bill of particulars
discovery and inspection, severance of trial from co-deft.

5-8-73 / Filed Governments notice of readiness for trial.

A

72 CRIM 1362

DATE	PROCEEDINGS
	Prosper:
20-73	X Deft. (atty. present) withdraws his plea of not guilty and pleads guilty to counts 1-4. Pre-sentence investigation ordered. Sentence adjourned to July 27, 1973 at 2 P.M. Bail continued. Griesa, J.
27-73	X Isaac - Jury trial begun before Griesa, J.
28-73	X Trial continued.
29-73	X Trial continued.
2-73	X Trial continued and concluded. Jury finds deft. Isaac guilty on counts 1, 2 and 5. Pre-sentence investigation ordered. Sentence adjourned to Sept. 11, 1973 at 2 P.M. Bail continued. Griesa, J.
-27-73	X HERIBERTO PROSPER - Filed Judgment (atty present) It Is Adjudged that the deft. is hereby committed to the custody of the Atty. Gen. or his authorized representative for imprisonment for a period of ONE (1) year on each of counts 1, 2, 3 & 4 to run concurrent with each other. Pursuant to the provisions of Title 21, Sect. 841, U.S.C. the deft. is to be placed on Special Parole for a term of THREE (3) years to commence upon expiration of confinement. GRIESA, J. (copies issued)
17-73	X HERIBERTO PROSPER - Filed copy of judgment and commitment, with marshals ret. deft. delivered to Fed. Detention Hdqts. 6-27-73.
11-73	X ANGEL ISSAC - (Atty Present) Filed Judgment and Commitment. It Is Adjudged that the deft. is hereby committed to the custody of the Atty. Gen. or his authorized representative for imprisonment for a period of FOUR YEARS on each of Counts one, two and five to run concurrently with each other. Pursuant to the provisions of Title 21, Section 841, U.S. Code, the Court imposes a Special Parole Term of FIVE YEARS on each of Counts 1, 2 & 5 to run concurrently with each other. Special Parole is to commence upon expiration of the Four Year sentence. GRIESA, J. (copies issued) Motion to have jury verdict set aside is Denied.
-21-73	X ANGEL ISSAC - Filed notice of appeal from judgment. (n/m)
-21-73	X ANGEL ISSAC - Filed motion for leave to appeal in forma pauperis. MEMO END. Motion Granted. So Ordered. GRIESA, J.
0-9-73	X Issac - Filed CJA 21 authorization of appointing court reporters. Griesa, J.
0-10-73	Isaac - Mailed copy I of the CJA 20 to the A.O. for payment. Griesa, J.
0-10-73	X ANGEL ISAAC: Filed NOTICE TO THE DOCKET CLERK. Record on appeal has been transmitted to the U.S.C.A. for the Second Circuit on this date.
0-24-73	ANGEL ISAAC: Mailed Copy 2 of AUTHORIZATION for transcript. Approved by: Judge Griesa. Amount approved: \$486.20. Payee: Southern District C. R.
-19-73	X HERIBERTO PROSPER: Filed endorsement on letter from defendant; it reads: "Application for reduction of sentence denied. So ordered. Thomas P. Griesa, U.S.D.J. Sept. 19, 1972" Copy of decision sent to defendant.
2-5-73	X Filed transcript of record of proceedings, dated 6-27-73 + 9-11-73
6-28-73	X July 2-73
-25-74	Filed true copy of mandate from U.S.E.A., affirming judgment of U.S.D.C. Clerk Judgment entered 2-25-74 - Clerk. (n/m)

~~Criminal Record~~

DATE	FILINGS—PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS
3-4-74	ANGEL ISSAC - Filed copy of J & C , deft. delivered to Federal Detention Hdqtrs 2-13-74.	
4-9-74	ANGEL ISAAC- Filed notice of appeal by deft. from an order danying an evidentiary hearing on deft's motion for a new trial on April 3-74. m/n.	
4-4-74	Filed govt. memo of law.	
4-4-74	Filed Govt. affdvt. in opposition for new trial.	
4-4-74	Filed MEMO END on defts. motion for new trial. Motions denied. GRIESA, J.	
**1-3-74	Filed Noitice nx to the docket clerk that the supplemental record on appeal xhas been trans. to USCA Re:Angel Isaac.	
**2-20-74	Filed Motion for new trial and for an order releasing deft. angel Isaac from incarceration on bail.	
4-30-74	Filed notice that 2nd supplemental record has been trans. to the U.S.C.A.	
9-23-74	ANGEL ISAAC= Filed Deft's Notice of Motion for Reduction of Sentence and Affirmation in Support of Motion for Resentence.	
9-24-74	ANGEL ISAAC= Filed MEMO ENDORSEMENT on Defts Notice of Motion filed 9-23-74 for Reduction of Sentence. Motion Denied - SO ORDERED - GRIESA, J. (Mailed Notice 9-24-74)	
12-2-74	ANGEL ISAAC = Mailed Original CJA copy 1 to the A.O. Wash. D.C. for payment.....GRIESA, J.	
12-2-74	ANGEL ISAAC = Filed CJA appointment of counsel. Martin Jay Siegel, 250 W. 57th St. (701), New York, N.Y. 10019.....GRIESA, J.	

DATE

PROCEEDINGS

1-3-74 X ANGEL ISAAC: Filed NOTICE TO THE DOCKET CLERK. Supplemental record transmitted to U.S.C.A.

7-23-74 X HERIBERTO PROPER, et al - Filed the following papers received from the Magistrate: docket entry sheet, criminal complaint, S.D.N.Y., disocosition sheet, appointments of counsel, notices of appearance, appearance bonds(3), temporary commitment, and dismissal slip(re 2 defts.: Navedo and Ramirez)

9-30-74 ANGEL ISAAC-Filed Govt's Affdvt. in opposition to deft's motion to reduce sentence.

DATE

FILINGS—PROCEEDINGS

AMOUNT
REPORTED IN
EMOLUMENT
RETURNS

-12-73 Filed defts request for voir dire of jury (entered 12-5-74)
**9-19-73 Filed notice of motion for severance of trial (entered 12-5-74)
***9-19-73 Filed deft request to charge (entered 12-5-74)
*9-19-74 Filed govts request to charge (entered 12-5-74)

A TRUE COPY

WILLIAM E. BURGLER

W. E. Thompson
Asst. Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

72 CRIM. 1362

UNITED STATES OF AMERICA, :

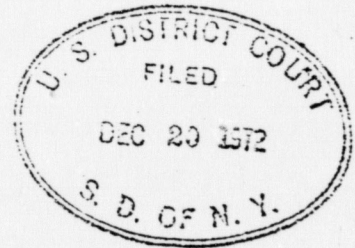
-v- :

HERIBERTO PROSPER and
ANGEL ISAAC, :

Defendants. :

INDICTMENT

72 Cr.



FIRST COUNT

The Grand Jury charges:

1. From on or about the 2nd day of August 1972, and continuously thereafter up to and including the 15th day of September, 1972 in the Southern District of New York, HERIBERTO PROSPER and ANGEL ISAAC, the defendants and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. On September 13, 1972, ANGEL ISAAC met with HERIBERTO PROSPER.

2. On September 13, 1972, ANGEL ISAAC introduced Robert Joura to HERIBERTO PROSPER.

3. On September 13, 1972, ANGEL ISAAC displayed samples of cocaine hydrochloride to Robert Joura.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

SECOND COUNT

The Grand Jury further charges:

On or about the 14th day of September, 1972, in the Southern District of New York, HERIBERTO PROSPER and ANGEL ISAAC, the defendants, unlawfully, intentionally and knowingly did possess with intent to distribute a Schedule II controlled substance, to wit, approximately 126.4 grams of cocaine hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B), and Title 18, United States Code, Section 2.)

THIRD COUNT

The Grand Jury further charges:

On or about the 4th day of October, 1972 in the Southern District of New York, HERIBERTO PROSPER,

the defendant, unlawfully, intentionally and knowingly did possess with intent to distribute a Schedule II controlled substance, to wit, approximately 248.3 grams of cocaine hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B).)

FOURTH COUNT

The Grand Jury further charges:

On or about the 13th day of November, 1972 in the Southern District of New York, HERIBERTO PROSPER, the defendant, unlawfully, intentionally and knowingly did possess with intent to distribute a Schedule II controlled substance, to wit, approximately 533.6 grams of cocaine hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B).)

FIFTH COUNT

1a

The Grand Jury further charges:

On or about the 2nd day of August, 1972 in the Southern District of New York, ANGEL ISAAC, the defendant, unlawfully, intentionally and knowingly did possess with intent to distribute a Schedule II controlled substance, to wit, .38 grams of cocaine hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B).)

Belle R. ...
Foreman

Whitney North Seymour, Jr.
WHITNEY NORTH SEYMOUR, JR.
United States Attorney

ISAAC (ATT PRESENT) is sentenced to 4 years in
on each of Counts 1, 2 and 5 with a 5 year Special Parole at the
4 years term concurrently. Execution of sentence stayed
appeal. Bail continued.
MOTION TO HAVE JURY VERDICT SET ASIDE
is DENIED.

Griesa, J. JH

United States District Court
SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

HERIBERTO PROSPER and
ANGEL ISAAC,

Defendants.

INDICTMENT

72 Cr.

WHITNEY NORTH SEYMOUR, JR.,

United States Attorney.

A TRUE BILL

Foreman.

FD-1-83-1-13-70-20M-1925

JUN 20 1973

JAN 2 DEPT. H. PROSPER C
PLEADS NOT GUILTY ASSIGN
BAIL \$10,000.00 B.R.B. 1/2/73

JUN 8 1973 ANGEL ISAAC COTTY
PLEADS NOT GUILTY BAIL \$10,000.00

(AUSA
FIGUEROA)
JUN 20 1973

BINSAL J

Def't Prosper and A
Present. Def't Prosper changes pl
Counts 1, 2, 3, and 4. Sent
2 PM. Sentence report ordered

JUN 27 1973 - Jury Trial Begun as

JUN 28 1973 - Trial Continued

JUN 29 1973 - Trial Continued - De

JUL 2 1973 - Trial Continued + Con

Jury finds Defendant Isaac li
1, 2 and 5. Sentence date
Sentence report ordered - B

July 21, 1973 Def't Prosper (Att. Present)
imprisonment on each of Counts 1, 2,
at same time with each other. Dismissed

ATTY (PRESENT)
TO CRISTH J.

VSAL J
PRESENT
SECURITY

Ed. Geno Crescenzi
on to Guilty on
once date July 21
d. Bail continued.

sa. J. Q.

TO ANGEL ISAHU.

1st Motion for Motion Denial
ended

Guilty on Counts

Sept 11, 1973 2PM

Bail continued.

renew, J. Q.

sentenced to 1 year

and 4 to run

to take in 1974

MR. SIEGEL: I received the Government's papers in opposition approximately two days ago, on Monday. And I received Mr. Prosper's affidavit yesterday.

THE COURT: That is beside the point. Mr. Isaac either was not candid with you -- well, that isn't right. You said that you had the tape.

MR. SIEGEL: That's correct, your Honor.

THE COURT: You must have known that the tape related to this so-called incident at Prosper's house. There was no chronological excuse for not having the affidavit of your client as to what took place at that house.

I suppose what he would say is that he was told that Prosper lied on the stand. I suppose that is what the affidavit would say.

I am going to cut it short. I think I am going to deny the motion and I am going to deny the motion for a new trial. I am going to deny the motion for an evidentiary hearing. I am going to, of course, deny the application for releasing Mr. Isaac on bail.

Let me just put a statement on the record. The defendant Isaac has moved, as the earlier discussion at this hearing shows, for relief based on the alleged recantation of the testimony of one Heriberto Prosper, who

acted as a Government witness at the trial of the narcotics case against Isaac.

In support of the application, Isaac has submitted his own affidavit of February 8, 1974, and an affidavit of one Juan Denizard dated the same date.

These affidavits state that there was a conversation in the first week of January 1974, apparently or allegedly participated in by Isaac, Denizard and Prosper. It appears that this occurred on the subway.

I assume that by this time Mr. Prosper, who had been sentenced on a guilty plea, was out on parole and Mr. Isaac was not yet incarcerated because the decision on the appeal from his criminal conviction had not yet come down, but he was not yet in prison.

Isaac was tried in July of 1973 and was found guilty on two counts of possession of cocaine with intent to distribute. He was sentenced to concurrent sentences of four years in prison. In addition, there was a count of conspiracy. His sentence of four years in prison was concurrent on all three counts.

He appealed and his conviction was firmed without opinion by the Court of Appeals on January 9, 1974. Going back to the record on the application for a new trial, the affidavits of Isaac and Denizard state that at the

1 conversation in the first part of January 1974, Mr.
2 Prosper said that his testimony at the trial was the
3 result of information and coersion on the part of the
4 federal authorities.
5

6 Isaac and Denizard state that Prosper said at
7 that conversation that in fact Isaac was not involved in
8 the crime. Isaac's motion papers also attach a copy of a
9 letter from one --

10 MR. SIEGEL: Edwin Montalvo, your Honor.

11 THE COURT: -- to Mr. Siegel dated February 3,
12 1974, saying that Montalvo had talked to Prosper at the
13 West Street Detention Center in September of 1973.

14 According to Montalvo, Prosper at that time
15 said that he had been threatened by the federal agents
16 with actions against his family and that this is why he
17 "framed Angel."

18 The Government has submitted an affidavit from
19 Mr. Prosper dated March 28, 1974. Prosper states flatly
20 in the affidavit that what he testified at the trial was
21 the truth.

22 Nowhere in the affidavit does he indicate any
23 recantation of his trial testimony. He states that if he
24 were called to testify again, he would testify in the same
25 way as he testified at the first trial.

Prosper states that on or about December 20, 1973, he met Isaac and Denizard on the subway. Isaac asked Prosper to help him. Prosper said that he could not help Isaac.

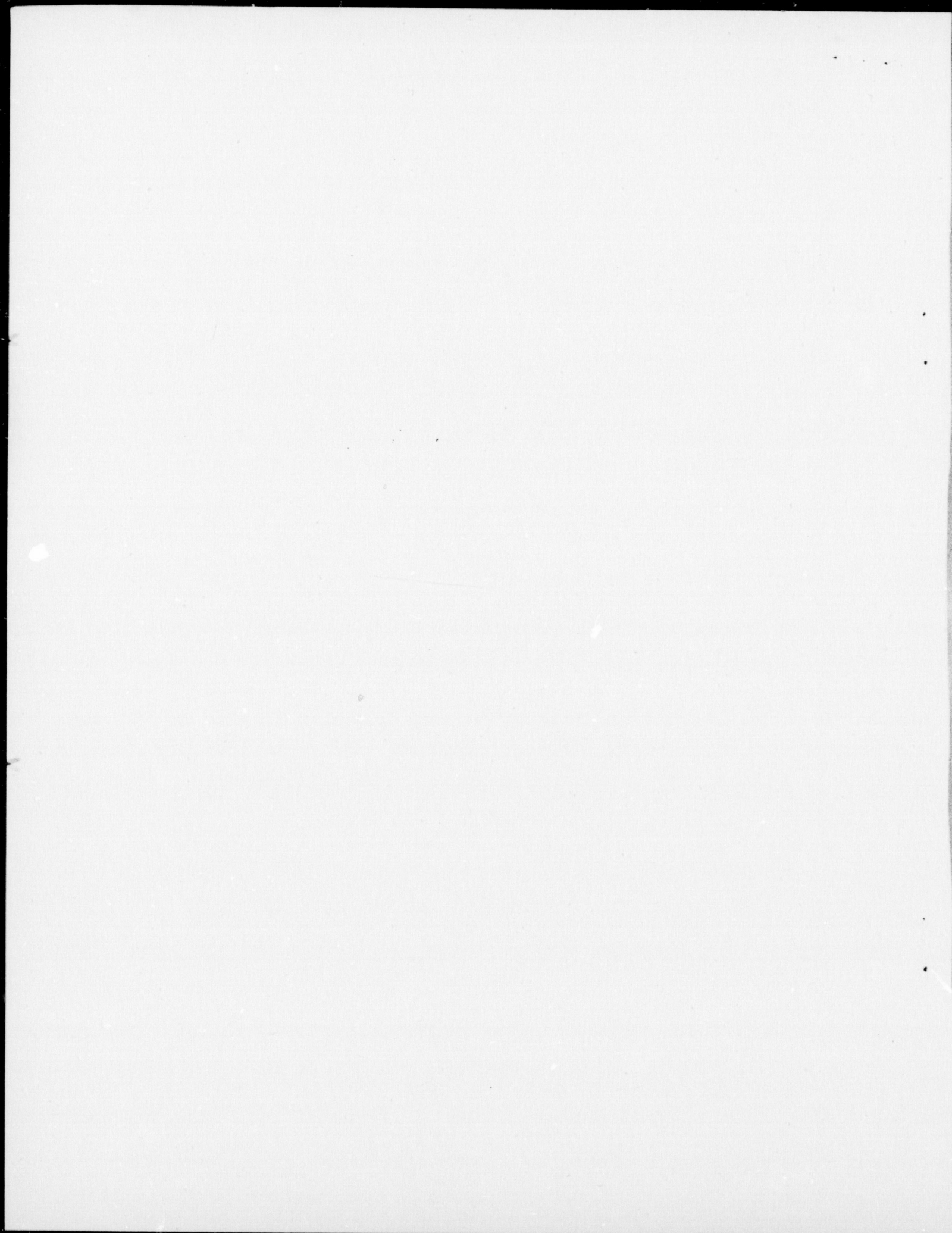
According to Prosper's affidavit, after that meeting, Isaac phoned Prosper at his residence two or three times and in February 1974, Isaac came over to Prosper's home.

According to Prosper, Isaac asked Prosper to change his testimony, which Prosper refused to do. Prosper's affidavit says that a few days later, Isaac again came to his home with another person and Prosper told them both to leave.

Prosper denies ever telling Montalvo that he had testified falsely as a result of pressures by the Government.

The rule in this circuit is that alleged recantations of testimony are looked upon with great skepticism, U.S. vs. Troche, 213 F. 2d 401.

The Court of Appeals in that case also stated that it is proper to decide motions for retrial on the questions of alleged recantation, that it is proper in appropriate circumstances to decide such motions on affidavits, without the calling of witnesses.



1
2 In my view in the present situation, there is
3 no warrant for holding an evidentiary hearing. The fact
4 is that Mr. Prosper has not recanted. The statements or
5 alleged statements to Isaac and to Montalvo do not amount
6 to a recantation.

7 Even if I were to accept as fact that Prosper
8 told Isaac and Montalvo that Prosper had testified falsely
9 under Government pressure, this would not be enough to
10 create grounds for a new trial. The circumstances of such
11 interviews are obviously suspect.

12 It would be perfectly natural for a person in
13 Prosper's position to make some kind of temporizing
14 remarks to simply placate Isaac and Montalvo on the
15 occasion of what would obviously be extremely embarrassing
16 meetings.

17 Thus, statements made by Prosper on such
18 occasions would be almost meaningless.

19 The fact is that we have a sworn affidavit of
20 Prosper in which he reaffirms his trial testimony and
21 indicates that he did not in fact make any recantation in
22 his discussions with Isaac and Montalvo.

23 One of the necessities for granting a new trial
24 in a situation of alleged recantation is that the Court
25 must be reasonably well satisfied that the testimony given